Supreme Court, U.S.
FILED

No. 991550 MAR 21 2000

SUPREME COURT OF THE UNITED STATES

STEVEN CORREIA,
Petitioner

Vs.

LARRY MEACHUM, COMMISSIONER,
LOWELL P. WEICKER, JR.
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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A. Questions Presented For Review

1. Does a state prisoner have the same "substantial right" given to a federal defendant as enunciated in Gordon v. United States, 344 U.S. 414, 420-421(1953), to not just cross examine a witness about a prior inconsistent statement but to introduce the actual written inconsistent statement of that witness because it is the "best evidence" of the inconsistency and thus "more reliable, complete and accurate"?

2. Should the constitutional principle set forth in Wardius v. Oregon, 412 U.S. 470, 474(1973), that there be a "balance of forces between the accused and his accuser" be enforced in the Second Circuit as consistently as it is in the Eighth Circuit so as to require a new trial in the present case where the trial court used a double standard when it refused to allow the petitioner to introduce as a physical exhibit the complainant's prior written inconsistent statement given a few hours after the incident wherein she stated that the perpetrator hid his face the whole time but the court almost immediately thereafter allowed the state to introduce a hospital report containing the complainant's prior consistent statement about how she was assaulted even though the petitioner was willing to stipulate to the matters for which the exhibit was offered?

B. List Of All Parties

The caption of the case lists all the parties.

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D. Citation Of Official And Unofficial Reports

There are no official or unofficial reports but the opinions and orders entered in the case are reproduced in the Appendix.

E. Statement Of The Basis For Jurisdiction

i. On November 12, 1999, the United States Court of Appeals For The Second Circuit affirmed the District Court's denial of the Petition For Writ Of Habeas Corpus filed by the petitioner.

ii. On December 22, 1999, the United States Court of Appeals For The Second Circuit denied the Petition For Rehearing With Suggestion For Rehearing En Banc timely filed by the petitioner.

iv. The statute which confers on this Court the jurisdiction to review on a writ of certiorari the above judgement, is 28 U.S.C., Sec. 1254.

F. Constitutional Provisions

The constitutional provision involved in this case is the Fourteenth Amendment to the United States Constitution, which states that

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

G. Statement Of The Case

1. General Court History

The petitioner was charged in a four count indictment with sexual assault in the first degree, kidnapping in the first degree (two counts), and robbery in the first degree. At a trial in 1992, a jury on all four counts found him guilty. The trial court imposed a sentence of 45 years to serve. The Appellate Court of Connecticut affirmed his conviction. State v. Correia, 33 Conn. App. 457, 636 A.2d 860(1994). The Supreme Court of Connecticut denied his Petition For Certification. State v. Correia, 229 Conn. 911, 642 A.2d 1208(1994). This Court denied the petitioner's initial Petition For Writ of Certiorari concerning the direct appeal. Correia v. Connecticut, 513 U.S. 898, 115 S. Ct. 253, 130 L. Ed.2d 174(1994).

The petitioner then filed a Petition For Writ of Habeas Corpus in the District Court pursuant to 28 U.S.C., Sec. 2254. The District Court denied that petition. App. A-7. The District Court granted the petitioner's Motion For Certificate Of Probable Cause allowing for an appeal. The petitioner then timely field an appeal to the United States Court of Appeals For The Second Circuit pursuant to 28 U.S.C., Sec. 2253. The United States Court of Appeals For The Second Circuit affirmed the District Court's ruling denying the petition. App. A-2.

2. Preliminary Facts

The complainant at the trial in **1992**, testified that on November 16, **1981**, a man who had forced himself into a car in which she was a passenger subsequently raped her. After the perpetrator locked the driver in the hatchback trunk area, he took the complainant to a secluded area and raped her as he held a gun. They returned to the car, and the driver was

released from the hatchback area. The perpetrator then directed the driver to a certain location and he threatened the driver and the complainant not to report the matter. He then let the driver and complainant leave. The whole incident lasted over an hour and occurred between 1:00 a.m. and 2:00. a.m. (Record 8, containing trial transcript, hereafter referred to as 'Rec. 8 Trans', pp.137-157).

The driver and the complainant then went to a nearby hospital. At the hospital they reported that the complainant had been raped and the police were called. Later that morning, the complainant went to another hospital and then to the New Haven Police Department. Rec. 8 Trans., 156-160. The complainant gave a statement to the police which was typed and she signed it at about 4:30 a.m. The complainant arrived home at about 5:30 a.m. Rec. 8 Trans., 159-160.

Later that morning, Detective Mary Fish went to the complainant's apartment where the complainant and the driver repeated what happened. Later in the morning when they went to the police station to look at photographs in 3 big books, the complainant could not make any identification. Rec. 8 Trans., 161-164.

Five years later, in December 1986, the police showed the complainant a photoboard, State Exhibit #13. At that time, the complainant picked out a picture of the person she believed had assaulted her. The photoboard contained 12 pictures and the complainant signed and dated the top of the picture that she had picked out. Rec. 8 Trans., 197-200, 205. It was uncontested that the picture selected had been a picture of the petitioner.

Prior to any in court identification at trial, the petitioner had unsuccessfully moved to suppress the prior out of court identification, and also had unsuccessfully moved to waive his presence during any in court identification procedure. More specifically, the petitioner had moved to prevent any suggestive one on one identification procedure in front of the jury as he sat at the defense table. State v. Correia,

supra, 33 Conn. App. at 464, Rec. 8 Trans., 89-110. The petitioner's counsel emphatically stated that he "want[ed] the record to show that we didn't just allow [the petitioner] to sit here" and that he was "trying to do everything [he could] to prevent [an] identification" procedure other than an in court line up. The trial court responded by not only denying said motion but by ruling that it was "going to bring up the [petitioner], have him seated here then we will bring in the [jury] panel." Rec. 8 Trans., 97-109. The petitioner did not raise these adverse rulings in his petition for writ of habeas corpus but any such one on one identification in court is suspect and can be considered in evaluating the strength of the state's evidence and whether any errors concerning the issues that are raised were harmful.

At the trial in 1992, the complainant identified the petitioner as the man who raped her 11 years earlier in 1981. When the complainant made the identification, the petitioner was the only black man in the courtroom other than a black juror and as mentioned above, the petitioner was pursuant to a court order sitting at the defense table which the trial court noted later was a "place that anyone would pick out as the defendant's spot." Rec. 8 Trans., 143-144, 264.

3. Facts Concerning Exclusion Of Prior Inconsistent Statement

The complainant testified in front of the jury that she would "never forget [the perpetrator's] face" and that she had no doubt about the in court identification. She also testified that her conscience would not allow her to make any identification unless she was 100% sure. Rec. 8 Trans., 143-144, 203-204, 264. She also testified that the prosecutrix had shown her the photoboard with the petitioner's picture and her signature on it twice within the past month prior to her in court identification. Rec. 8 Trans., 205.

The complainant more specifically testified that when she first saw the perpetrator in the parking lot, and when they left the car prior to the driver being locked in the trunk, and when she was assaulted in the field, those areas were all well lit so that she could see his face. Rec. 8 Trans., 139-149. She testified that the perpetrator was not covering his face with anything and he "**wasn't making any effort to hide himself**" and was letting her see "so much" of him that she thought he was going to kill her. Rec. 8 Trans., 141-142(emphasis added). She testified that the conditions were such that she had "**very ample opportunity to look at him**" and would not forget "the **look on his face**." Rec. 8 Trans., 148-149(emphasis added).[1]

On cross-examination, the complainant testified that she signed under oath the written statement that she gave to the police a few hours after the assault in 1981. She admitted in response to an inquiry on any facial features, that she had said in her signed statement that she could only tell the police that the perpetrator's "chin might have been long but besides that I didn't - he was kind of hiding his face the whole time in a way". Rec. 8 Trans., 212-213. She testified that in her 1981 statement she intentionally gave a "very vague description" because she knew she would be giving "another description in a few hours". Rec. 8 Trans., 214. She hesitated to directly answer whether her 1981 statement was true or false but did testify that in her 1981 statement she "did not answer to the best of her ability". Rec. 8 Trans., 216.

Outside the presence of the jury, petitioner's counsel offered the complainant's 1981 signed 8-page statement as Defense Exhibit # 1. Petitioner's counsel argued that he was offering the statement as a prior inconsistent statement and that he wished to offer the whole statement but was willing to

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[1] The driver testified that she was not able to make any photo identification. In court she could only state that the petitioner had a build and skin tone similar to that of the perpetrator. Rec. 8 Trans., 316-328.

submit in the alternative just certain portions concerning the complainant's description of the perpetrator but especially the part where she stated that the perpetrator hid his face the whole time and might have had a long chin. Rec. 8 Trans., 222-228. The petitioner's counsel stated that he was offering the exhibit pursuant to the petitioner's "Federal Constitutional right [to a] fair trial, [to] due process, [to] present a defense, [and to] cross examination of witnesses." Rec. 8 Trans., 228.

The trial court agreed with the petitioner's counsel that the statement was "inconsistent" but the court refused to admit the exhibit in whole or in part because the introduction of such a physical exhibit would "unfairly highlight" the matter. Rec. 8 Trans., 229. The trial court stated that

> "[t]he evidence is before the jury. The witness has acknowledged that she made those statements.... There's no need to present them in written form.... There is absolutely no need to present any written form. She has acknowledged it. You have them in written form. You can refer to them during your closing argument as often as you like. [If s]he denied making those statements... [t]hen the written statements or portions of the written statement might be introduced. But there's absolutely no reason that I can think of except to somehow **unfairly highlight** these by putting them in writing." Rec. 8 Trans., 228-229(emphasis added).

In response to the court's inquiry as to whether the jury had received oral testimony that the complainant had made the statement, petitioner's counsel responded that the "evidence would have more force behind it ... if I'm able to introduce it physically... [T]he physical -- an exhibit being offered, physical evidence has more weight to it." Rec. 8 Trans., 230-

231. The court rejected that argument and excluded as a marked exhibit the above-mentioned prior written inconsistent statement made under oath a few hours after the assault. Rec. 8 Trans., 231-232.

Soon thereafter, a mere 18 pages later in the trial transcript, the state offered as a physical exhibit a hospital report containing the complainant's statements made soon after the assault. State's Exhibit 15. The report was 15 pages long and contained hearsay statements of the complainant as to the assault. For example, the first page states that "Pt states 'was raped by a black man at gunpoint' ". The "History as related to physician by patient" states "forcible sexual assault by a black male at the point of a gun while the patient was getting into the car along with her girlfriend. He asked the patient to remove her clothing and had sexual intercourse with complete penetration and insemination. Also anal penetration." The report also mentioned the patient was being "[r]eferred to Yale New Haven [Hospital] for morning after pill". The report also listed specimens that she gave. The petitioner's counsel sought to exclude the exhibit, stating that

> "basically in reference to the Court's previous ruling when I tried to get in the written statement of the lady and I mentioned any physical piece of evidence [has more weight], I think adopting [the court's previous ruling] that any type of physical report is going to emphasize the facts that aren't being contested here, but which can cause the emotions to be -- people feel sorry for the victim and all that. When they have in the jury room a report talking about where she mentions she was raped then it shows the procedures that this lady went through, all the testing, et cetera, I think that is going to cause the jury to start feeling sorry. Pretty much mentions a lot of tests in that report. And I think anything that the State is going to offer the report for, I would probably stipulate to. So in light -- usually I wouldn't object. But in light of the Court's ruling on

> Whelan when I tried to get in the physical piece of evidence, I think that the Court in accord with that ruling should keep this out. And of itself, she [the prosecutor] hasn't cited the magic words yet, but the statutory provisions for using for hospital records and things of that nature." Rec. 8 Trans., 247-248(emphasis added).

Without any further comment by the parties, the trial court stated "[i]t's admissible.... It's admissible on a number of grounds. The other ruling that you're talking about, I wouldn't want to use that as a precedence for anything. This is admissible." Rec. 8 Trans., 248-249. The trial court never stated the other reasons or why its earlier decision excluding the petitioner's physical exhibit should not be used as a precedence to exclude the state's exhibit. Nor did the court explain why the physical exhibit was needed when the petitioner was willing to stipulate to the matters within the exhibit.

After the trial court allowed the state to introduce the hospital report as a physical exhibit, the nurse who made many of the entries in the report testified as to its content. Rec. 8 Trans., 254-257. [2] The state's prosecutrix in her closing argument to the jury explained that the hospital report would be in the jury room as an exhibit. Rec. 8 Trans., 547.

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[2] That witness, Ann Marie Conneley read the report that had been introduced and repeated its content that the " 'Patient states: was raped by a black man at gunpoint... Patient was driven to park and raped vaginally and orally at gunpoint' ". Rec. 8 Trans., 254. The court informed the jury that in a sexual assault case a witness is allowed to testify that the complainant told the witness that she was raped under a rule called constancy of accusation. Rec. 8 Trans., 253-254. The witness also fully described the exams that the complainant underwent mentioned in the report including an external exam,

4. Court History Concerning Current Issues

As mentioned earlier, the petitioner at trial cited his federal constitutional rights to a fair trial, to due process, to present a defense and to cross-examination as grounds for the admission of the physical document containing the complainant's prior written inconsistent statement. Rec 8 Trans, 228. In his brief to the Appellate Court of Connecticut, the petitioner argued that his "federal constitutional rights to due process, to a fair trial, to present a defense and to the equal protection of the laws were violated by the court's refusal to admit the victim's prior inconsistent statement as an exhibit," Record 8, Appendix B, pp. 5-6, 14-15. In his brief to the Appellate Court, the petitioner also argued that the trial court employed an unconstitutional "double standard" when it excluded the complainant's prior inconsistent statement as a physical exhibit but allowed the complainant's prior hospital statement containing a description of the rape to be admitted. Id., 12-15. The petitioner cited Wardius v. Oregon, 412 U.S. 470, 475-477, 93 S. Ct. 2208, 37 L. Ed.2d 82(1973) for the principle that criminal rules must be a two way street and that it is "fundamentally unfair to require a defendant to conform to

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internal exam, collection of cultures from the cervix, the vagina and the mouth, and the collection of hairs. The witness also testified that the complainant was given medication for infection. The witness testified that the entire series of exams and medications took 2.5 hours. The witness also testified that according to the report a cervical smear showed the presence of sperm and that the complainant was then sent to Yale New Haven Hospital because St. Raphael's does not get into the morning after pill and abortion. Rec. 8 Trans., 254-257. Thus the nurse who made many of the entries in the report which was allowed as a physical exhibit testified fully as to the content of the entire report.

a certain rule while not requiring the state to conform." The petitioner argued that even if the trial court's refusal to admit the physical exhibit might be considered harmless because of the verbal testimony on the matter,

> "the court's refusal to admit the physical document was part of a pattern of rulings which unfairly allowed the state to enhance its case while only allowing the defense to present a watered down version of its case. Thus the Defendant's ... federal constitutional rights to due process, to a fair trial, to present a defense and to the equal protection of the laws were violated by the court's refusal to admit the victim's prior inconsistent statement as an exhibit." Id.

The Appellate Court failed to address the above mentioned federal constitutional issues and ruled that the court did not abuse its discretion in excluding the statement as a physical exhibit. The Appellate Court ruled that the physical exhibit was cumulative to the oral testimony on the matter. State v. Correia, supra, 33 Conn. App. at 463. In his Petition For Certification to the Supreme Court of Connecticut, pp. 1, 9-10, the petitioner raised the above issue concerning the trial court's exclusion of the physical exhibit containing the complainant's prior inconsistent statement and also raised the trial court's double standard in admitting the state's physical exhibit. The petitioner cited Wardius v. Oregon, supra, and argued that his federal constitutional rights to due process, to a fair trial, to present a defense and to the equal protection of the laws were violated by said rulings. The Supreme Court of Connecticut denied the petition without an opinion. State v. Correia, supra, 229 Conn. at 911. Thus the petitioner by seeking such discretionary review satisfied the exhaustion requirements set for in O'Sullivan v. Boerckel, U.S. , 119 S. Ct. 1728, 144 L. Ed.2d 1(1999).

The respondent in its Answer to the Petition For Writ Of Habeas Corpus filed in the District Court conceded that the petitioner exhausted his state court remedies concerning the issue involving the trial court's refusal to allow the petitioner to introduce a physical exhibit containing the complainant's prior inconsistent statement. Record 8, Answer To Petition For Writ Of Habeas Corpus, dated May 19, 1995, p. 2, par. 6.

In the District Court, the magistrate made a recommendation that the petition be denied but the magistrate specifically held that the petitioner had exhausted his state court remedies and issued recommendations on all the merits of the above issues. Recommended Ruling On Petition For Writ Of Habeas Corpus, March 2, 1999, pp. 6-11.
The District Court conducted a de novo review of the magistrate's ruling and also denied the petition but the court did address the merits of the above issues. District Court Ruling, p. 1, App. A-7. The District Court stated that it "assume[d] arguendo that the trial court erred in excluding from evidence the victim's prior inconsistent statement", and further stated that the "written statement might have underscored ... [and] reinforce[d]" the inconsistencies, and "arguably enhanc[ed] the impeachment value of the inconsistencies", but the court ruled that the excluded exhibit was "cumulative" and that the petitioner's counsel was able to fully present, develop and argue the matter at trial. District Court Ruling, pp. 5, 9-11, App. A-10, A-13, A-14.

Concerning the double standard issue, the District Court stated the petitioner

> "has not demonstrated a 'double standard' in the trial court's evidentiary rulings. By Petitioner's expansive reading of [Washington] v. Texas [, 388 U.S. 14, 87 S. Ct. 1920, 18 L. Ed.2d 1019(1967)] and Wardius, each time defendant's evidence is erroneously excluded based on a misapplication of state law and the state's **similar evidence is permitted**, a per se error of constitutional proportions would result. Such a

proposition is not supported by the well-established precedent used to analyze whether erroneous evidentiary rulings rises to the level of a constitutional deprivation." District Court Ruling, pp. 12-13, App. A-15 (emphasis added).

The Second Circuit affirmed the District Court's denial of the petition. The court found that the excluded exhibit was cumulative but the court did not address the double standard issue. Ruling, pp. 2-3, App. A-3 to A-5. The decision of the Court of Appeals is more fully discussed in the following argument, pages 24-28.

H. Argument

1. Argument Of The Petitioner

In a very similar case, this Court held that an actual written statement of a witness that contradicts his trial testimony should be admitted as evidence even if that witness concedes that he gave such a prior inconsistent statement. In Gordon v. United States, 344 U.S. 414, 420-421, 73 S. Ct. 369, 97 L. Ed. 447(1953), this Court held that

> "an admission that a contradiction is contained in a writing should not bar admission of the document itself in evidence, providing it meets all other requirements of admissibility and no valid claim of privilege is raised against it. The elementary wisdom of the **best evidence** rule rests on the fact that the **document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description** and this is no less true as to the extent and circumstances of a contradiction. We hold that the accused is entitled to the application of that rule, not merely because it will **emphasize the**

> **contradiction** to the jury, but because it will **best inform them as to the documents' impeaching weight and significance.** Traditional rules of admissibility prevent opening the door to documents which merely differ on immaterial matters. The alleged contradictions to this witness' testimony relate not to collateral matters but to the very incrimination of petitioners. **Except the testimony of this witness be believed, this conviction probably could not have been had.**" Id. (emphasis added).

The Court also held that the trial court erred in excluding evidence regarding whether the witness expected to receive any leniency for a pending case in exchange for his testimony. The Court held that "the combination of these two errors was sufficiently prejudicial to require reversal" and that the trial court's errors had "**prejudiced substantial rights and the judgment must be reversed.**" Id., 422-423 (emphasis added).

> Similarly, it has been observed that
> "[e]ven when the **witness admits** having made the other [inconsistent] statements, this does not prevent the opponent from offering it in evidence by his own witness, for he may prefer to have it clearly brought out and **emphasized**, and it would be unfair to restrict him to the **unemphatic mode** or proving it by the witness' admission and to subject him to the necessity of disputing whether the admission has been full and exact." 3A Wigmore On Evidence, Sec. 1037, at 1044-1045 (James H. Chadbourn ed., 1970) citing Gordon v. United States, supra (first emphasis in original, later emphasis added).

"Since 'seeing is believing', and demonstrative evidence appeals directly to the senses of the triers of fact, it is today universally felt that this kind of evidence possesses an

immediacy and reality which endow it with particularly persuasive effect." 2 McCormick On Evidence, Sec. 212, at 3 (John William Strong ed., 1992). Exhibits which are testimonial in nature are usually excluded from the jury room except for

> "written or recorded confessions in criminal cases [where] despite their obvious testimonial character ... their centrality in the case warrants whatever emphasis may result ... [C]rucial documents ... may frequently be of vital help to the jury. On the other hand, where a writing is of only minor importance, dispatch to the jury may induce an emphasis upon it out of proportion to its intrinsic worth." Id., Sec. 217, pp. 29-30 (emphasis added).[3]

In the present case, the trial court took a major piece of evidence central to the case and transformed it into a minor piece of evidence by not allowing the jury to see it. The complainant gave a signed statement under oath a few hours after the incident in which she swore that concerning facial features, the perpetrator's "chin might have been long but besides that I didn't - he was kind of hiding his face the whole time in a way." In her live and dramatic testimony before the jury, she pointed to the petitioner and identified him as the man who raped her and further proclaimed that she was "100 per cent sure and if I wasn't my conscious could not allow me

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[3] This Court has noted that a prosecutor in most situations has a right not to accept stipulations or admissions in lieu of introducing more powerful physical evidence. See Old Chief v. United States, 519 U.S. 172, 187, 117 S. Ct. 644, 136 L. Ed.2d 574(1997)(as a general rule, a prosecutor has the right to "present to the jury a picture of the events relied upon. To substitute for such a picture a naked admission might have the effect to rob the evidence of much of its fair and legitimate weight."

to point him out unless I was 100 per cent sure. **I'll never forget his face**." Rec. 8 Trans, 144 (emphasis added). The trial court's ruling allowed the jury to see the complainant's dramatic in court identification of the petitioner but did not allow the jury to see her prior inconsistent statement describing her limited view of the perpetrator. Thus the court actually de-emphasized a piece of evidence which was central to the case and thereby violated the petitioner's constitutional rights to due process, to a fair trial, to present a defense, and to cross examine witnesses.

The standard of review adopted by this Court for a habeas petition is whether an unconstitutional trial ruling "had substantial and injurious effect or influence in determining the jury's verdict (citation omitted). This standard is grounded in the federal harmless error statute ... [which requires the court to conduct] an examination of the record ... [for trial errors that] affect ... **substantial rights**." Brecht v. Abrahamson, 507 U.S. 619, 631, 113 S. Ct. 1710, 123 L. Ed.2d 353 (1993)(emphasis added). This Court in Gordon, supra at 423, stressed that the defendant had a "substantial right" to present evidence consisting of a prior written inconsistent statement even if there was an oral admission as to the inconsistency. Surely, the constitutional right to due process includes the substantial right to introduce such powerful evidence and the denial of that right qualifies for habeas review and an analysis of the entire record to judge the harmfulness of the error.

Also, this Court has held that when a "federal judge in a habeas proceeding is in grave doubt about whether a trial error of federal law had 'substantial and injurious effect or influence in determining the jury's verdict', the error is not harmless. And the petitioner must win." O'Neal v. McAninch, 513 U.S. 432, 436, 115 S. Ct. 992, 130 L. Ed.2d 947(1995). "[G]rave doubt ... mean[s] that, in the judge's mind, the matter is so **evenly balanced** that he feels himself in virtual **equipoise** as to the harmfulness of the error." Id., 435(emphasis added). The court in the present case never

reviewed the weakness of the state's case and thus failed in its duty to balance the evidence to determine the effect of the trial court's error on the verdict.

Even without this Court's decision in Gordon stressing the importance of a physical exhibit containing a prior sworn inconsistent statement, the present case warrants habeas relief because the exclusion of any type of proper defense evidence in a close case deprives a defendant of fundamental fairness. A state prisoner seeking federal habeas relief has the burden of showing that any evidentiary error violated a "specific constitutional right" or resulted in a "denial of fundamental fairness." Server v. Mizell, 902 F.2d 611, 615(7th Cir., 1990), see Pemberton v. Collins, 991 F.2d 1218, 1226(5th Cir., 1993). Thus a certain type of ruling might not violate a specific constitutional right but it could still violate the catchall due process clause of the constitution because in a specific case the ruling has such an affect on the trial that it renders the trial fundamentally unfair. In such a situation, an error becomes a de facto constitutional error.

> "We will grant federal habeas relief if an evidentiary error in a state trial 'is of such magnitude as to constitute a denial of fundamental fairness under the **due process clause**.' (citations omitted). **Erroneous exclusion of evidence** is fundamentally unfair if the evidence was material in the sense that it was **crucial, critical, and highly significant**." Porretto v. Stalder, 834 F.2d 461, 465 (5th Cir., 1987) (emphasis added). See Collins v. Francis, 728 F.2d 1322, 1336-1337(11th Cir., 1984).

Thus the issue of whether evidentiary error on a usually non constitutional issue takes on constitutional magnitude is intertwined with the issue of whether the error was harmful or concerned a matter that affected the verdict in a particular case.

Concerning a similar case also brought under 28 U.S.C., Sec. 2254, the Second Circuit has ruled that the

> "right to present a defense is one of the 'minimum essentials of a fair trial.' Chambers v. Mississippi, 410 U.S. 284, 294, 93 S. Ct. 1038, 1045, 35 L. Ed.2d 297(1973)... It is a right which derives not only from the general fairness requirements of the due process clause of the fourteenth amendment but also, and more directly, from the compulsory clause of the sixth amendment. It is a right which comprehends more than the right to present the direct testimony of live witnesses, and includes the right under certain circumstances, to place before the jury secondary forms of evidence... A defendant has the **constitutional right to introduce a secondary form of evidence**....
>
> However, 'erroneous [state] evidentiary rulings do not automatically rise to the level of constitutional error sufficient to warrant the issuance of a writ of habeas corpus. Rather, the writ would issue only where the petitioner can show that the error deprived him of a fundamentally fair trial.' (citation omitted). It is the **materiality of the excluded evidence** to the presentation of the defense that determines whether a defendant has been deprived of a fundamentally fair trial.... 'The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. **It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed**.

> This means that the omission must be evaluated in the context of the **entire record**. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. **On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.**" Rosario v. Kuhlman, 839 F.2d 918, 924-925(2nd Cir., 1988)(third emphasis in original, other emphasis added).

In Rosario, federal habeas corpus relief was granted to a state prisoner because the improperly excluded evidence "would have been much more convincing" than the evidence that was allowed at trial concerning a "material point." Id., 927(emphasis added). The court ruled that the more convincing evidence which was excluded "could have created a reasonable doubt that did not otherwise exist" and thus the exclusion violated the petitioner's "fundamental right to a fair trial." Id. See also Lyons v. Johnson, 99 F. 3d 499, 504(2nd Cir., 1996)(habeas relief granted because although the case seemed solidly built upon the identification of three witnesses, such evidence has intrinsic unreliability and the trial court erred in preventing the petitioner from physically displaying to the jury another person similar to the petitioner and whom the petitioner contended was the real shooter); and Justice v. Hoke, 90 F.3d 43, 47-48(2nd Cir., 1996)(habeas relief granted to a state prisoner because the trial court had excluded evidence that would have collaborated his defense, and when the evidence is already of "questionable validity, additional evidence of relatively minor importance might be sufficient to

create a reasonable doubt that did not otherwise exist").

The key question then to be considered in federal habeas cases concerning erroneous state evidentiary rulings is whether the error at trial was actually harmful. Concerning whether an error is harmful, it has been generally held that "[w]here evidence of the defendant's guilt is proven by overwhelming evidence, an erroneous ruling may be harmless." United States v. Wolf, 839 F.2d 1387, 1395(10th Cir., 1988). On the other hand, the weaker the evidence, the weaker the state's claim that the error was harmless.

In Glasser v. United States, 315 U.S. 60, 67, 62 S. Ct. 457, 86 L. Ed. 680(1941), this Court noted that

> "the case against [the petitioner] is not a strong one... In all cases the constitutional safeguards are to be jealously preserved for the benefit of the accused, but especially is this true where the scales of justice may be delicately poised between guilt and innocence. The error, which under some circumstances would not be grounds for reversal, cannot be brushed aside as immaterial since there is a real chance it might have provided the slight impetus which swing the scales toward guilt." (emphasis added).

Thus, the erroneous exclusion of evidence in a state trial becomes a constitutional error warranting federal habeas relief when the exclusion was harmful, that is when the excluded evidence was crucial, critical and highly significant, and or so material as to affect a jury's verdict concerning whether a reasonable doubt existed. In situations where the state's evidence is not overwhelming, federal habeas relief is warranted if the excluded evidence was merely more emphatic than the evidence that was allowed to be presented at trial since "evidence of relatively minor importance might be

sufficient to create a reasonable doubt" when the state's evidence is already questionable. Rosario v. Kuhlman, supra.

To make these determinations, the court must examine the entire record. Brecht v. Abrahamson, supra. In the present case, the state's evidence on identification was weak because of the lack of any other testimony supporting the complainant's identification of the petitioner and because of the great length of time that elapsed between the incident involving a stranger of a different race and any identification. It must be noted that there was no DNA or blood grouping testimony in this case because although the complainant completed a rape crime kit almost immediately after the incident, the state lost that evidence. Rec 8 Trans, 378-385, 407-431.

The passage of time certainly weakened any identification. In Brecht v. Abrahamson, supra, 507 U. S. at 637, this Court noted in a different context that the "erosion of memory ... accompan[ies] the passage of time." Furthermore, the "identification of strangers is proverbially untrustworthy." United States v. Wade, 388 U.S. 218, 228, 87 S. Ct. 1926, 18 L. Ed.2d 1149(1967). Also, the identification in the present case was not only of a stranger but also of a black person by a white person. Such cross-racial identifications are less reliable than an identification of someone of the same race. Manson v. Braithwaite, 432 U.S. 98, 115, 97 S. Ct. 2243, 53 L. Ed.2d 140(1977).

Since the evidence in the present case on identification was very weak, the exclusion of evidence of such great strength as described by this Court in Gordon was harmful and thus violated the petitioner's constitutional rights to due process, to a fair trial, to present a defense, and to cross examination.

Also, in considering whether a constitutional error was harmful, a federal court in reviewing a habeas petition should examine the entire record. In the present case such a review shows not only the harmfulness of the error of excluding the

exhibit but also shows that the trial court used an unconstitutional double standard regarding the admission of physical exhibits. The trial court prevented the petitioner from introducing the complainant's prior inconsistent statement as a physical exhibit but allowed that state to introduce her prior consistent statement as a physical exhibit. In objecting to that written statement, petitioner's counsel referred to the trial court's previous ruling that the complainant's prior written inconsistent statements were not admissible as physical exhibits because such exhibits would unfairly highlight any statement. Petitioner's counsel offered to stipulate to the contents of the report. Petitioner's counsel argued that the complainant's prior statement in the hospital report describing the rape would arose the emotion and sympathy of the jury. The trial court stated that it "wouldn't want to use that [previous ruling] as precedence for anything." Rec. 8 Trans, 246-249.

In Washington v. Texas, supra, 388 U.S. at 14, this Court held that it is a violation of the Sixth Amendment applicable to the states through the due process clause of the Fourteenth Amendment to prevent a criminal defendant from introducing a type of evidence that the state is allowed to introduce. In that case, a state statute provided "that persons charged or convicted as co participants in the same crime could not testify for one another, although there was no bar to their testifying for the State. Id., 16-17. The Court especially noted the "absurdity of the rule is amply demonstrated by the exceptions that have been made to it. For example, the accused accomplice may be called by the prosecution to testify against the defendant." Id., 22. The Court held that there was a violation of the petitioner's constitutional rights to present evidence "in his favor because the State arbitrarily denied him the right to put on" that evidence. Id., 23. Similarly in the present case, the trial court 'arbitrarily' denied the petitioner his right to introduce the complainant's prior written inconsistent statement as a physical exhibit but then almost immediately in

a ruling full of 'absurdity' the trial court allowed the state to introduce the complainant's prior consistent statement.

In Wardius v. Oregon, supra, 412 U.S. at 474, note 6, this Court stated that it has "been particularly suspicious of state trial rules which provide nonreciprocal benefits to the State when the lack of reciprocity interferes with the defendant's ability to secure a fair trial." The Court stated that pursuant to the due process clause of the Fourteenth Amendment, there should be a "balance of forces between the accused and his accuser." Id., 474. The Court stated that criminal rules involving the disclosure of evidence must be viewed as a "two way street". Id., 475. The issue in that case concerned whether the petitioner could present alibi evidence when he had not given the state notice of an alibi as required by a statute. The Court held that it was unconstitutional to prevent the petitioner from introducing alibi evidence when there was no reciprocal rule to prevent the state from introducing similar evidence on the issue to rebut the alibi. Id., 475-479. Similarly in the present case, it was a violation of the petitioner's constitutional rights to due process, to a fair trial, to present a defense, and to cross examination, when the trial court prevented the petitioner from introducing the complainant's prior written inconsistent statement as a physical exhibit since the trial court refused to employ a reciprocal rule to prevent the state from introducing the complainant's prior written consistent statement as a physical exhibit. Since the rules involving the disclosure of evidence must be a 'two way street', then surely the rules involving the introduction of evidence must be on a 'two way street'.

The petitioner in a supplemental citation letter of October 26, 1999, brought to the Second Circuit's attention prior to oral argument the case of Newman v. Hopkins, 192 F.3d 1132(8th Cir., 1999). In Newman, the Eighth Circuit granted habeas relief to a state prisoner on the grounds that the trial court violated his federal constitutional rights to due process and to present a defense when it refused to allow him

to introduce an exemplar of his voice unless he actually testified as a witness under oath and subjected himself to cross examination. The Eighth Circuit ruled that since the state could have compelled the defendant to provide a voice exemplar regardless of whether he testified, then the defendant had a "reciprocal right" to introduce a voice exemplar regardless of whether he testified. Id., 1135. Similar to the present petitioner's argument, the Eighth Circuit to support its ruling relied on the principle set forth in Wardius that due process requires that there be a "balance of forces between an accused and his accuser." Newman, supra at 1135.

In deciding that the error was not harmless, the Eighth Circuit noted that the "central issue at trial was the identify of the perpetrator" and whether the defendant had an Hispanic accent was an "important factor in determining whether he fit the description of the attacker." Id., 1137. The Eighth Circuit ruled that the error was not harmless even though the Nebraska Supreme Court in its ruling on another issue held that the evidence of guilt was "overwhelming." Id.

In the present case, the central issue also was identification and the excluded exhibit contained a very important statement by the complainant concerning her opportunity to view her attacker and here ability to describe his face. More importantly, in the present case the trial court actually employed a double standard in its two rulings. The court first denied the petitioner's request to admit the physical exhibit containing the complainant's prior sworn statement that her attacker was "kind of hiding his face the whole time in a way" which contradicted her trial testimony that the attacker "wasn't making any effort to hide himself." The court ruled that the introduction of the actual written statement as an exhibit would "unfairly highlight" the inconsistency. Then the court almost immediately granted the respondent's request to admit an exhibit containing the complainant's prior consistent statements about her attacker even though the petitioner was willing to stipulate to the contents of the exhibit and referred

to the court's previous ruling as a precedent. This situation is far more egregious than the situation in Newman since in that case there were no contrasting rulings such as the trial court first excluding a voice exemplar offered by the defendant but then admitting an exemplar offered by the state.

Also in the present case the evidence of guilt was far from overwhelming while in Newman federal habeas relief was granted even though the Nebraska Supreme Court held that the evidence of guilt was overwhelming.

2. Ruling Of The Second Circuit

The Second Circuit affirmed the District Court's denial of the petition. The Second Circuit stated that:

> "(1) Correia claims that the district court erred when it ruled that the state trial court did not violate his federal rights to due process and to a fair trial when it 'refused to allow the petitioner to introduce as a physical exhibit the complainant's prior written inconsistent statement.' Only hours after the assault, the complainant gave a signed statement to the police in which she responded to the question 'Did the rapist have any outstanding facial features?' with 'His chin might have been a [little] long, but besides that I didn't, he was kind of hiding his face the whole time in a way.' Correia points to this response as a prior statement inconsistent with the complainant's confident identification five years later. He argues that he should have been allowed to introduce the written version of this statement and that the trial court's evidentiary ruling preventing him from doing so was a violation of the federal constitution.
>
> Erroneous evidentiary rulings do not necessarily constitute constitutional error. 'The court's duty on a petition for habeas corpus is to determine whether

the excluded testimony was material to the presentation of the defense so as to deprive the defendant of fundamental fairness.' Rosario v. Kuhlman, 839 F.2d 918, 924(2nd Cir., 1988). *Here, no such deprivation has occurred because the written testimony at issue was cumulative of oral testimony offered at trial.* The complainant did not deny making the apparently inconsistent statements. Because the evidence not admitted does not add any exculpatory fact to the record that was before the jury, it cannot cast doubt upon Correia's guilt and does not justify a new trial.' See Rosario, 839 F.2d at 925." Ruling, p. 3, App. A-4 to A-5 (emphasis added).

Although the legal arguments previously raised in this petition were presented in the petitioner's briefs or supplemental citation letter to the Second Circuit, the above quotation from the Second Circuit's opinion contains the court's entire opinion as to the petitioner's said legal arguments except for the court's conclusion, after it had addressed a closing argument issue, that it had "considered Correia's other arguments and find them to be without merit." Ruling, p. 4, App. A-6. The Second Circuit failed to address both this Court's ruling in Gordon that a written prior inconsistent statement is always admissible because it is the best evidence of that inconsistency (and thus never merely cumulative) and the court failed to address the double standard issue raised pursuant to this Court's opinion in Wardius and the Eight Circuit's opinion in Newman.

3. Reasons For Granting Review By Writ Of Certiorari

a. The Second Circuit's Ruling Conflicts With This Court's Decision In Gordon v. United States

The rulings of the Appellate Court of Connecticut and the Second Circuit that the physical exhibit was merely cumulative conflict with this Court's decision in Gordon that an exhibit containing an inconsistent statement is admissible because by its very nature it is more than merely cumulative of oral testimony. In Gordon, supra, 344 U. S. at 423, this Court described a defendant's right to introduce such a written statement as a "substantial right". The Court stressed the importance of such a document to any case, stating that an "admission that a contradiction is contained in a writing should not bar admission of the document itself.... [since the document is] the best evidence ... [and] a more reliable, complete and accurate source of information as to its contents than anyone's description ... [and] it will emphasize the contradiction ... [and] best inform [the jury] as to the document's impeaching weight and significance." Gordon, supra, 344 U.S. at 420-421. "Evidence is 'cumulative' when it adds very little to the probative force of the other evidence". United States v. Williams, 81 F.3d 1434,1443(7th Cir., 1996). A prior sworn inconsistent statement does not fit the definition of cumulative evidence but rather it is the antithesis of such evidence because rather than adding 'very little', it actually adds much more since by its very nature it is better than the other evidence and "more reliable, complete and accurate".

Also, the Second Circuit and the Appellate Court of Connecticut ignored and never even discussed the actual finding by the trial court that the physical exhibit rather adding little to the probative value of the other evidence would actually "highlight" the prior sworn statement by the complainant that she was not able to see the perpetrator's face. Rec. 8 Trans, 228-229. The trial court excluded the evidence

because its value was too high and it was too probative and not for the opposite reason that it's probative value was very little.

Although the Second Circuit clearly implied that it found the trial court's ruling to be "[e]rroneous", Ruling, p. 3, App. A-4, the Second Circuit prior to deciding that the excluded exhibit did not cast doubt on the petitioner's guilt never compared the weakness of the state's case on the issue of identification against the value of the excluded exhibit as required by this Court's rulings in Brecht v. Abrahamson, supra, and O'Neal v. McAninch, supra. Under those decisions, a court in a habeas proceeding must review the entire record and balance or weigh the evidence in a matter involving a violation of a substantial right. Thus even if it was true that the excluded exhibit was cumulative and of minor importance, the Second Circuit was still required to weigh the allegedly minor strength of that exhibit against the weakness of the state's case. But the Second Circuit did not conduct such an examination nor even mention the strength of the state's case. It would be difficult to imagine a weaker case concerning identification. There was no DNA or other physical evidence. Five years elapsed between the incident in which the perpetrator "was kind of hiding his face the whole time in a way" and the initial identification of the petitioner as that perpetrator; and a total of eleven years elapsed between the incident and the in court identification of the black petitioner by the white complainant as he was forced to sit at the defense table as the only black man in the courtroom other than a single juror. Rec 8 Trans, 89-110, 143-144, 264.

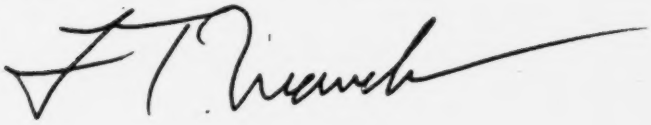
b. The Second Circuit's Ruling Conflicts With This Court's Decision In Wardius v. Oregon And The Eighth Circuit's Decision In Newman v. Hopkins

The Second Circuit only addressed the trial court's ruling excluding the petitioner's exhibit and did not address the almost simultaneous ruling admitting

the state's exhibit. The court never addressed the double standard issue or the trial court's failure to allow a 'balance of forces between the accused and his accuser', nor did the court even mention the Wardius case or the recent Newman case. The court after addressing a closing argument issue, which is not being raised in this petition, did state that it had "considered Correia's other arguments and find them to be without merit." Ruling p. 4, App. A-6. The Second Circuit thus in effect adopted the decision of the District Court on the double standard issue. That court referred to the petitioner's double standard claim based on Wardius but the court rejected the argument that a court uses an unconstitutional "double standard" when it "erroneously exclude[s]" a defendant's evidence but admits the "state's similar evidence". District Court Ruling, p. 12, App. A-15.

But court rulings that are different on similar evidence clearly reveal a double standard and show that the parties are not being treated equally. Prior to Brown v. Board of Education, 347 U.S. 483, 491, 74 S. Ct. 686, 98 L. Ed. 873(1954), the "American courts ... labored with the doctrine [of separate but equal] for over half a century." Finally in Brown, this Court bluntly ruled that "[s]eparate ... [is] inherently unequal." Id., 495. Separate and different rulings on the admission of similar evidence also reveals unequal treatment but in a courtroom rather than in a classroom. This Court should review a ruling that condones in a courtroom what would be condemned in a classroom.

The Petitioner, Steven Correia



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I. Appendix

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1. RULING OF THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

SUMMARY ORDER

THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 12th day of November, one thousand nine hundred and ninety-nine.

PRESENT: HON JOSEPH M. McLAUGLIN,
HON DENNIS JACOBS,
HON ROBERT D. SACK,
Circuit Judges.

FILED
NOV 12 1999

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STEVEN CORREIA,

Plaintiff-Appellant,

-v.-

99-2237

LARRY MEACHUM, Commissioner; LOWELL P. WEICKER, JR.,

Defendants-Appellees

----------X

APPEARING FOR THE APPELLANT: FRANCIS T. MANDANICI, Assistant Public Defender, New Haven, CT

APPEARING FOR THE APPELLEES: JO ANNE SULIK, Assistant State's Attorney, Rocky Hill, CT

Appeal form the United States District Court for the District of Connecticut (Arterton, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be AFFIRMED

Steven Correia appeals from the judgment of the United States District Court for the District of Connecticut denying his petition for a writ of habeas corpus pursuant to 28 U.S.C. §2254. Correia is incarcerated following his conviction in 1992 of sexual assault, kidnapping and robbery.

On November 16, 1981, a woman ("complainant") and her female friend were leaving a bar in New Haven when a man brandishing a gun forced his way into their car. The man forced the complainant's friend into the trunk of the car, and robbed, sodomized and raped the complainant. The rapist threatened to harm the complainant if she reported the incident to the police.

Both women gave statements to the police that night. The next morning, the complainant looked through police photographs in hopes of identifying the rapist but did not recognize any of the pictured men.

Five years later, in 1986, the complainant was shown more photographs of possible assailants. She immediately identified Correia as the rapist. She again identified him as the rapist during his trial in 1992, nearly eleven years after the assault. A jury convicted Correia of all counts charged. The

conviction was upheld on appeal. See State v. Correia, 33 Conn. App. 457, 636 A.2d 860 (Conn. App. Ct. 1994).

In 1995, Correia filed a petition for a writ of habeas corpus in the district court. He made two claims: (1) that the trial court violated his right to a fair trial and to due process, both protected by the federal constitution, when it refused to allow him to introduce in written form the prior inconsistent statement of the alleged victim; and (2) that the prosecutor's closing argument impermissibly drew attention to Correia's constitutionally protected decision not to testify. The district court concluded that both claims were meritless and denied Correia the requested writ. Correia appeals.

(1) Correia claims that the district court erred when it ruled that the state trial court did not violate his federal rights to due process and a fair trial when it "refused to allow the petitioner to introduce as a physical exhibit the complainant's prior written inconsistent statement." Only hours after the assault, the complainant gave a signed statement to the police in which she responded to the question "Did [the rapist] have any outstanding facial features?" with "His chin might have been a long, but besides that I didn't, he was kind of hiding his face the whole time in a way." Correia points to this response as a prior statement inconsistent with the complainant's confident identification five years later. He argues that he should have been allowed to introduce the written version of this statement and that the trial court's evidentiary ruling preventing him from doing so was a violation of the federal constitution.

Erroneous evidentiary rulings do not necessarily constitute constitutional error. "The court's duty on a petition for habeas corpus is to determine whether the excluded testimony was material to the presentation of the defense so as to deprive the defendant of fundamental fairness." Rosario v. Kuhlman, 839 F.2d 918, 924 (2d Cir. 1988). Here, no such deprivation has occurred because the written testimony at issue was cumulative

of oral evidence offered at trial. The complainant did not deny making the apparently inconsistent statements. Because the evidence not admitted does not add any exculpatory fact to the record that was before the jury, it cannot cast doubt upon Correia's guilt and does not justify a new trial. See Rosario, 839 F.2d at 925.

(2) Correia contends that during her closing statement the prosecutor impermissibly commented on his exercise of his constitutional right not to testify. She said:

> Mr. Correia should not be allowed in the courtroom to twist the evidence and distort the evidence because the evidence proves that he was guilty.

Correia argues that this statement is a "trap" set by the prosecutor to force the jury to think about Correia's decision not to testify. He contends that this statement would be construed as a suggestion that Correia himself twisted evidence, leading the jury to reflect that he had done no such thing because he had not testified at all.

The impropriety of a prosecutor's statements in this situation is judged by "whether they naturally and necessarily would be interpreted by the jury as a comment on the defendant's failure to testify." United States v. Knoll, 16 F.3d 1313, 1323 (2dCir. 1994)(internal quotation marks omitted). In light of the common practice of referring to counsel by the name of the client, the prosecutor's comment would not "necessarily" be interpreted by the jury as commentary on Correia's silence.

Even if the prosecutor 's statement would be construed not as an assertion about the tactics used by Correia's counsel, but as an indirect reference to Correia's choice not to testify, the trial court promptly cured any harm by instructing the jury that:

> Mr. Correia has not testified here. And I've told you a number of times and you all agreed, and we've gone over this, that a defendant does not have to testify. And you all agreed it was a good idea, much better than when a person has to prove their innocence.

Even if the closing statement did allude somehow to Correia's decision not to testify, Correia has shown no "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637, 113 S.Ct. 1710, 1722 (1993). Without a showing of actual prejudice, Correia is not entitled to habeas relief. See id. Correia bears "a particularly heavy burden" on this claim because the trial court gave a curative instruction. Knoll, 16 F.3d at 1323. Correia has not demonstrated that any prejudice stemmed from the prosecutor's allegedly improper statement.

We have considered Correia's other arguments and find them to be without merit. For the reasons set forth above, the judgment of the district court is hereby **AFFIRMED**.

FOR THE COURT:
KAREN GREVE MILTON,
ACTING CLERK
BY:

_____
Lucille Carr, Deputy Clerk

2. RULING OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

STEVEN CORREIA Plaintiff Petitioner	:	FILED MARCH 31, 1999
v.	:	No. 3:95cv195(JBA)
LARRY MEACHUM Defendant Respondent	:	

RULING ON PETITIONER'S OBJECTIONS [DOC. #26] TO MAGISTRATE'S RECOMMENDED RULING [DOC. #25] ON PETITION FOR WRIT OF HABEAS CORPUS [DOC. #4]

On March 2, 1999, the Magistrate Judge filed a Recommended Ruling Denying the Petition for Writ of Habeas Corpus [doc. #4]. [Doc. #25]. On March 17, 1999, Petitioner filed written objections [doc. #26] with corrections [doc. #27] to the Recommended Ruling under 28 U.S.C. §636(b).

After a full de novo review, the Recommended Ruling is APPROVED and ADOPTED, with the following clarification, pursuant to 28 U.S.C. §636(b)(1)(B) and Rule 2 of the Local Rules for United States Magistrates (D.Conn. 1994). The Petition for Habeas Corpus [doc. #4] is accordingly DENIED.

Procedural Background

On May 1, 1992, a Connecticut state jury found the Petitioner guilty of first degree sexual assault in violation of Conn. Gen. Stat. § 53a-70(a), two counts of first degree kidnapping in violation of Conn. Gen. Stat. § 92(a)(2) and first degree robbery in violation of Conn. Gen. Stat. § 53a-134(a)(4).

On June 26, 1992, the Petitioner was sentenced to forty-five years to run consecutively with the sentence he was already serving on another conviction in Massachusetts. On direct appeal, Petitioner's conviction and sentence was [*sic*] affirmed by the Connecticut Appellate Court, State v. Correia, 33 Conn. App. 457 (1994), and his petition for certification to the Connecticut Supreme Court was denied, State v. Correia, 229 Conn. 911 (1994), as was his petition for certiorari, 513 U.S. 898 (1994).

Factual Background

The trial testimony indicates that at approximately 1:00 a.m. on November 17, 1981, the victim and her female roommate, both nineteen years old, left the Agora Ballroom, a bar located in New Haven, Connecticut, and walked to the victim's car, which was parked in a nearby lot. (Tr. at p. 134). After they had gotten into the car, the Petitioner, a stranger, approached the driver's side window with a gun and ordered the driver-victim to "shut up and let me in." (Id. at 138). Once inside the victim's car, the Petitioner continued to point the gun at the driver and ordered the driver to drive away. (Id. at 140) After a few blocks, the Petitioner ordered the driver to park the car and open the trunk so that the victim's roommate could be locked inside. (Id. at 142). Then the victim and Petitioner returned to the car where Petitioner demanded all of the victim's money, which was $5, and then ordered her to drive several more blacks. (Id. at 145). At this point, Petitioner ordered the victim out of the car and took her at gun point to a large field where he ordered her to undress, and then he sexually assaulted her. (Id. at 146). First, Petitioner ordered the victim to perform oral sex on him and then he penetrated the victim vaginally. (Id. at 146-7). The assault lasted approximately fifteen minutes. (Id.) Afterwards, the Petitioner ordered the victim to get dressed, but as she was getting dressed her car keys became lost in the field. (Id. at 150). Initially, Petitioner and the victim attempted to locate the keys using his lighter, but they had to

return to the car to retrieve a flashlight. (Id. at 152). After finding the keys, they returned to the car, released the roommate from the trunk. (Id. at 153). With the gun still pointed at her head, the victim drove until the Petitioner told her to stop. (Id. at 154).

Petitioner then had the victim and roommate write down their addresses and telephone numbers and attempted to verify their accuracy against their drivers' licenses and checkbooks. (Id. at 155). Petitioner ordered the victim out of the car and walked her away from the car, threatening her if she notified the police. (Id. at 156). After, Petitioner continued down the street, the victim returned to the car where she told her roommate she had been raped. (Id. at 156-7). At approximately 2:00 a.m., the victim drove the car directly to a nearby emergency room where she was examined, treated, and the police were notified. (Id at 157-9; see State's Full Ex. #15, Hospital Report, App. B at p. 46a).

After leaving the hospital, at approximately 5:15 a.m. on November 17, 1981, the victim provided Sergeant Michael Sweeney of the New Haven Police Department a signed a [*sic*] statement under oath detailing the incident and her recollection of the assailant's physical appearance. (See App. B, at p. 39a-Def. Ex. One for Identification [Victim's] 1981 Signed Statement under Oath). Later that morning, the victim returned to the police station and was unable to identify the assailant from hundreds photographs shown to her. (Id. at 162-3, 219). More than five years passed before victim was contacted in 1986 by Sergeant Sweeney, who requested that she look at some additional photographs. (Id. at 197). In 1986, the victim was shown an array of photographs and immediately identified the Petitioner as her assailant. (Id. at 203). Another six years passed and in 1992, the Petitioner was tried and found guilty of all charges.

In the petition for writ of habeas corpus, filed in May 1995, [1] Petitioner asserts two grounds. First, Petitioner claims that the trial court's evidentiary ruling excluding as an exhibit one of the victim's prior inconsistent statement deprived him of a fair trial. Second, Petitioner claims that in her summation, the prosecutor's statements improperly focused attention on the Petitioner's failure to testify.

Discussion

I. Exclusion of prior inconsistent statement

As in the Magistrate's Recommended Ruling, the Court assumes arguendo that the trial court erred in excluding from evidence the victim's prior inconsistent written statement given to the police the night of the attack. (Recommended Ruling at 9). However, the Magistrate found that "addition of the written statement into evidence would not have served to cast doubt on the petitioner's guilt because the evidence was otherwise introduced." (Id.).

Petitioner contends that the Magistrate Judge reached her decision without mentioning the facts of the case that suggest the prosecutor's "case on the element of identification was extremely weak." (Pet'r Objection at p. 2). Petitioner correctly observes that the exclusion of the victim's prior written statement "must be evaluated in the context of the entire record" in order to determine whether such an evidentiary error violates due process. The Court has reviewed the entire trial transcript for this purpose.

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[1] The Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, 110 Stat. 1214 (1996) does not apply to habeas corpus petitions filed before its effective date, April 24, 1996. Reyes v. Keane , 90 F.3d 676, 679 (2nd Cir. 1996).

A writ of habeas corpus will issue only in the rare case where the Petitioner can demonstrate that the erroneous evidentiary ruling deprived Petitioner of a fundamentally unfair [*sic*] trial by showing that the "the omitted evidence [evaluated in the context of the entire record] creates a reasonable doubt that did not otherwise exist." Justice v. Hoke, 90 F.3d 43, 47 (2d Cir. 1996) (citation and quotation omitted).

In this case, the trial court excluded the victim's 1981 sworn statement prepared and signed the morning of the incident, despite its undisputed inconsistency with her trial testimony. This Court's habeas corpus review is not to determine error in the trial court's evidentiary ruling, but whether such ruling deprived Petitioner of his constitutional right to present a defense and receive a fair trial. Therefore, assuming arguendo that the trial court's evidentiary ruling was erroneous, the entire trial record is considered to determine whether admitting the victim's sworn statement could have created reasonable doubt that otherwise did not exist.

Identification of the assailant, the critical issue in this trial, required the jury to credit the victim's ability to identify the Petitioner as her assailant, since she was the only witness who positively identified the Petitioner. The victim's roommate was unable to positively identify the Petitioner from a photo array and therefore was not permitted to identify the Petitioner in court, although she testified that the Petitioner was of similar complexion and physical build to the assailant. Although there may have been two other eyewitnesses, a couple with a stroller who were almost hit by the victim's car during the kidnapping, they were never found by the police and consequently did not testify at trial.

The trial transcript makes clear that the major thrust of the Petitioner's defense was to challenge the victim and her roommate's ability to identify the Petitioner. During cross-examination of each, and in his closing statement, Petitioner's

trial counsel focused on undermining the positive identification made by the victim. Petitioner's counsel interrogated the victim and her roommate about the amount of alcohol they had consumed over a short period of time prior to the crime, the lack of lighting throughout the incident, the five-year time lapse between the incident and the victim's identification of the Petitioner in a photo array in 1986 and the additional six year delay before Petitioner's trial in 1992.

Most relevant to this petition, Petitioner's counsel cross-examined the victim and Sergeant Sweeney about the alleged inconsistencies between the victim's trial testimony and her 1981 sworn statement to the New Haven police in the hours immediately following the incident. Specifically, Petitioner contended that the victim's sworn statement given that morning was more accurate and at odds with her later claimed ability to identify the Petitioner in a photo array and in court, (Tr. at 144, 213), in that the victim was then unable to recall any outstanding facial features since "he was kind of hiding his face the whole time in a way." The Petitioner sought to highlight the victim's ambiguous statement about the assailant's complexion – "He was pretty dark, yet he wasn't really light complexioned for a black person but he wasn't really dark, either," (Tr. at 217), and introduced the victim's post-assault statement that "I don't think he had any facial, you know, beard or mustache or anything," (Tr. at 219). Finally, Petitioner also pointed out that in contrast with her trial testimony about the watered-down drinks she consumed at the bar that night, she made no such reference in her written statement. (Tr. 209).

Although the victim's actual written statement was not admitted into evidence, the trial court made clear:

> You can make further use of the statement, if you wish. I don't want to make it appear I'm foreclosing you of any avenue of cross-examination with regards to inconsistencies. You have had a free range of cross-

examination in that and you can continue. But as far as presented them as marked exhibits, I don't see any necessity for that.

(Tr. at 232).

Petitioner claims that the victim's sworn statement as a marked exhibit would have had additional impeachment impact, particularly when viewed in light of the other evidence. However, after a thorough review of the record including the thorough cross-examinations of the victim and of Officer Sweeney with respect to the victim's "inconsistencies" with her prior sworn statement, the Court concludes that the Petitioner has not demonstrated that the omitted written statement created a reasonable doubt and its omission thus deprived the Petitioner of his constitutional right to a fair trial. While the written statement might have underscored whatever credibility impeachment was achieved by cross-examining the victim on her inconsistencies by serving as a written memoralization, this reinforcement purpose is insufficient to create a reasonable doubt that did not otherwise exist by virtue of the trial interrogation of her inconsistent statements already presented to the jury. The Petitioner was not only permitted to thoroughly cross examine the victim with the specific misconduct statements contained in her prior written statement, (Tr. at 212-219), but these inconsistencies were also fully explored in the cross examination of Sergeant Sweeney, the officer who took the victim's statement. (Tr. 368-371).

Furthermore, in summation, Petitioner's trial counsel argued these inconsistencies highlighting the lapse in time and encouraged the jury to request a read back of the testimony relating to the statement. (Tr. at 571-575). In fact, the jury did request a read back of the identification testimony given by the victim and her roommate, including the portion of the victim's testimony relating to the alleged inconsistencies. (Tr. 698). The trial court also instructed the jury in its original charge and in response to the jury's subsequent note requesting additional

instruction about "reasonable doubt" about how the inconsistencies in a witness's testimony and prior statements were to be considered. (Tr. at 648, 707). Finally, while the Petitioner emphasizes that the sworn statement contains "inconsistent statements" made by the witness, the Court notes that the statement also contains many statements that are wholly consistent with the victim's trial testimony which could have negated in some part the impact of the inconsistencies if admitted as a full trial exhibit.

Based on this record, the Court concludes that the defendant was not denied his Sixth Amendment fair trial rights by exclusion of the victim's prior written statement, where the consistencies were fully presented, developed, and argued before the jury. See e.g., Chapman v. Meachum, 790 F. Supp. 63 (D.Conn. 1992)(denying petition for writ of habeas where trial court refused to admit into evidence a tape recording of witness' prior inconsistent statements where all credibility issues raised by the prior inconsistent statements were exhaustively examined on cross-examination). Any additional benefit from the admission of the sworn statement, while arguably enhancing the impeachment value of the inconsistencies, "was cumulative" and "would not have created a reasonable doubt that did not otherwise exist" concerning Petitioner's guilt. Taylor v. Curry, 708 F.2d 886 (2d Cir. 1983); Vargas v. Walker, 1996 WL 118555 (E.D.N.Y. 1996)(denying writ of habeas corpus where state trial court excluded a police arrest report that allegedly contained inconsistencies relating to the petitioner's skin complexion finding that even though report might have been a more effective impeachment tool, impeachment by cross-examination of the witness was also effective).

Next, Petitioner objects to the Magistrate's ruling with respect to his contention that the trial court used an unconstitutional "double standard" in its evidentiary rulings by excluding the victim's sworn statement, but to admitting the victim's hospital treatment record offered by the prosecution.

Because the medical record contained the victim's consistent statement, the Petitioner contends that the trial court acted unconstitutionally by using a "double standard" to admit the prior consistent statement but exclude the prior inconsistent statement. In both Washington v. Texas, 388 U.S. 14 (1967) and Wardius v. Oregon, 412 U.S. 470 (1971) on which Petitioner relies, the state trial rules established different standards or procedures for the defendant's evidence. For example, in Wardius, supra, the Supreme Court found that due process forbade the enforcement of a state law requiring the defendant to disclose his alibi witnesses absent any reciprocal discovery obligation on the prosecutor. Similarly, in Washington v. Texas, supra, the Supreme Court found that a state court rule preventing defendant from introducing accomplice witness testimony denied the Petitioner his Sixth Amendment right to have compulsory process. Here, the Petitioner has not shown that the court applied the different evidentiary rulings based on whether the evidence was proffered by the Petitioner or the prosecutor. Rather, the most that can be concluded from the trial record is that the differences in evidentiary rulings were based on different grounds or a misunderstanding of the admissibility of inconsistent statements, the Petition [*sic*] has not demonstrated a "double standard" in the trial court's evidentiary rulings. By Petitioner's expansive reading of United States v. Texas and Wardius, each time defendant's evidence is erroneously excluded based on a misapplication of state law and the state's similar evidence is permitted, a per se error of constitutional proportions would result. Such a proposition is not supported by the well-established precedent used to analyze whether an erroneous evidentiary ruling rises to the level of a constitutional deprivation.

II. Prosecutor's remarks during summation

Finally, the Petitioner objects to the Magistrate's Recommended Ruling concluding that the prosecutor's remarks during summation "would not naturally and necessarily be understood by the jury to be a comment on the defendant's failure to testify ... [and that the trial court's] curative instructions were proper and did not unduly shift the jury's attention to the fact that the defendant did not testify." (Recommended Ruling at 14). Petitioner claims that the prosecutor's remarks contrasting the victim's demeanor, "your observation of her" with "Mr. Correia" should not be allowed in the Courtroom to twist the evidence because the evidence proves that he was guilty improperly drew attention to the defendant's failure to testify and that the trial court's attempt to cure the improper statement through two immediate curative instructions and one during its final instructions did not mitigate the harm, but rather focused the jury's attention on the defendant's failure to testify. Petitioner contends that the prosecutor's statement and trial court's subsequent attempts to cure is analogous to a "crooked knife that becomes more agitated by an effort to remove it." (Pet'r Objection at 21).

To summarize the context in which the prosecutor's comments should be construed, the record shows that towards the end of her summation, the prosecutor stated:

> And I would ask you as you go into your deliberations, go over the evidence carefully. Think about what she said, her demeanor, your observations of her. As you do, say the evidence proves that Mr. Correia is guilty.
>
> Mr. Correia should not be allowed in the courtroom to twist the evidence and distort the evidence because the evidence proves that he was guilty –

(Tr. at 600).

Petitioner's counsel immediately objected and the trial court postponed hearing the objection while the prosecutor abruptly concluded her summation:

> ... guilty of kidnapping, two counts of sexual assault in the first degree. The State of Connecticut urges you to return those verdicts. I wish you well.

(Tr. at 600-01).

The trial court then promptly instructed the jury that:

> Ms. Baran just mentioned that Mr. Correia may have tried to twist the testimony. His lawyer conducted cross-examination. Mr. Correia didn't try to twist anything. He did not testify in this case. He doesn't try to twist anything. So, I should correct you on that.

(Tr. at 601).

After excusing the jury, the trial court heard Petitioner's counsel on his objections to the prosecutor's comment, which he especially focused on this prosecutor on the basis of her prior similar closing, comments, which were apparently the subject of a pending appeal in another case. (Tr. at 602-613). In the jury's absence, the trial court denied Petitioner's motion for a mistrial. (Tr. 614-22). After the jury had been excused for approximately twelve minutes, (Tr. at 602, 613), the trial court instructed, in relevant part:

> In addition, let me say something about the remarks that I mentioned by [prosecutor] at the end of her argument where she said don't let Mr. Correia twist what's been said here. That remark has the potential to get you out of focus as to

> what's at issue here. Mr. Correia has not testified here. And I've told you a number of times and you all agreed and we've gone over this, that a defendant does not have to testify. And you all agreed it was a good idea, much better than when a person has to prove their innocence. And I don't think that [prosecutor] was trying to highlight the fact that a person did not testify. What she was calling attention to was the fact than on cross examination these people were vigorously cross examined, the witnesses for the State. There's nothing wrong with that. That's what lawyer's [*sic*] do. I've told you that. And that's not Mr. Correia trying to twist anything. That's [petitioner's counsel] trying to defend his client to the best of his ability, within the rules of evidence. There is nothing wrong with that.
>
> And I think the problem with [the prosecutor's] remarks are they seem to suggest that something is wrong with the way that they were cross examined. No, no. They were cross examined within the boundaries of the rules of evidence. That's what I get paid to do, to make sure that happens, and I think I did it.

(Tr. at 618-619).

Notwithstanding the Magistrate's conclusion that the prosecutor's remarks would not necessarily be understood by the jury as a reference to the defendant's right to not testify, the Court considers whether, assuming arguendo that such remarks did constitute improper comment on the defendant's failure to testify, Petitioner has demonstrated "that he suffered actual prejudice because the prosecutor's comments during summation had a substantial and injurious effect or influence in determining the verdict." Tankleff v. Senkowski, 135 F.3d 235, 251 (2d Cir. 1998) (citations omitted). In making this determination, the

Court considers "the severity of the misconduct; the measures adopted to cure the misconduct; and the certainty of conviction absent the improper statements." Id. at 251. (citations omitted).

With respect to the severity of the prosecutorial misconduct, the Court finds that even if the prosecutor's remarks were improper, they were ambiguous and "mitigated by the brevity and fleeting nature of the improper comments." Id. at 253. Furthermore, while the trial court's immediate prompt curative measure before hearing Petitioner's grounds for objective [*sic*] referenced Petitioner's not testifying, it was to lift any blame ascribed to him and reiterated his earlier colloquy with the jurors regarding the defendant's right not to testify. Finally, in the final jury instruction, the trial court echoed his earlier warnings[2] against drawing negative inferences from defendant's exercise of his Fifth Amendment right not to testify:

> As you know, in this case the defendant did not testify. The law does not compel [*sic*] defendant to take the witness stand and testify. And no presumption of guilt may be raised and no unfavorable inference may be drawn from the fact that a defendant decides not to testify. This is not the first time that I have mentioned this, and you should be familiar with this. And you agreed that you could abide by this. You must not permit to let such fact weigh against the

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[2] During voir dire, the trial court warned the jury against drawing any inference from the fact that the Petitioner might choose to exercise his right not testify. (Tr. at 20-21). Similarly, just before summations commenced, the trial court gave the following instruction:

> Let me just remind you once again that you should not draw any conclusions based on the fact that the defendant did not testify.

(Tr. at 533).

> defendant nor should it enter into you discussions or deliberations. The defendant is not required to establish his innocence. He need not produce any evidence whatsoever, if he does not choose to do so. As I have indicated, the burden is on the State to prove a defendant guilty beyond a reasonable doubt. If it fails, the defendant has a right to reply [*sic*] upon that failure and of right, must be acquitted.

(Tr. at 649).

In the full trial context, including the voir dire and pre-summation instructions, the two corrective instructions immediately following the prosecutor's remarks as well as the final jury instruction, the Court concludes that the jury was sufficiently instructed to cure any harm the prosecutor's misstatements may have caused. (See e.g., Fox v. Mann, 71 F.3d 66, 73 (2d Cir. 1995)(finding that trial court's instruction was forceful enough and sufficiently proximate in time to overcome whatever adverse effect the prosecutor's single improper remark regarding the defendant's failure to testify may have had on the jury). Finally, the Court does not conclude on this record that the evidence in this case was "so closely balanced that the prosecutor's comments were likely to have a substantial effect on the jury." See Tankleff, 135 F.3d at 253. While in cases such as this where eyewitness identification is the crucial issue and the identifying witness's credibility is critical, no one can know with any certainty what effect, if any, such remarks had on this jury's deliberations. However, given the ambiguity and brevity of the prosecutor's polemic coupled with the trial court's prompt curative instructions, other preliminary instruction and final forceful warning instructions not to draw any negative inference from the Petitioner's exercise of his right not to testify, the Court is satisfied that this trial record does not "demonstrat[e] that [petitioner] was substantially prejudiced by these [arguably] improper comments." Id. at 115.

Conclusion

Accordingly, after a full and careful de novo review, the Recommended Ruling [doc. #25] DENYING the Petition for Habeas Corpus [doc. #4] is APPROVED and ADOPTED for the foregoing reasons, overruling Petitioner's Objection [doc. #26], pursuant to 28 U.S.C. §636(b)(1)(B) and Rule 2 of the Local Rules for United States Magistrates (D.Conn. 1994). Therefore the Petition for Writ of Habeas Corpus [doc. #4] is DENIED.

The Clerk is directed to close this case.

IT IS SO ORDERED

_____

Janet Bond Arterton
United States District Judge

Dated at New Haven, Connecticut: March 31, 1999

3. ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE NEW YORK 10007

KAREN GREVE MILTON
ACTING CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty-second day of December one thousand nine hundred and ninety nine.

Steven Correia,

Plaintiff- Appellant — Dkt No: 99-2237

v. — FILED Dec 22 1999

Larry Meachum,

Defendant-Appellee

A petition for panel rehearing and a petition for rehearing en banc having been filed herein by the appellant Steven Correia.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service

and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

KAREN GREVE MILTON,
Acting Clerk

By:_____
Beth J. Meador
Administrative Attorney

Submitted By

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